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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 291

HELEN ELIZABETH PULLEY,

Appellee,

v.

CHARLIE HERBERT PULLEY,

Appellant

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

STATEMENT AS TO JURISDICTION

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APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13 and 15, files this his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment of the Supreme Court of North Carolina entered in the above-captioned case on March 28, 1962.

Opinions Below

The opinion and judgment of the Supreme Court of North Carolina filed October 11, 1961, in the action entitled "*Helen Elizabeth Pulley* v. *Charlie Herbert Pulley*", is reported in North Carolina Supreme Court Reports, Volume 255, at page 423.

The opinion and judgment of the Supreme Court of North Carolina filed March 28, 1962, in the action entitled "*Helen Elizabeth Pulley* v. *Charlie Herbert Pulley*", is reported in North Carolina Supreme Court Reports, Volume 256, at page 600.

Jurisdiction

The appeal herein is from a final judgment entered by the Supreme Court of North Carolina adjudging the appellant in contempt of court for his willful failure and refusal to comply with the judgment of the Clerk of the Superior Court of Onslow County entered upon the confession of judgment of the appellant.

The final judgment appealed from was entered on March 28, 1962. Notice of Appeal was filed in the Supreme Court of North Carolina on May 30, 1962.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment complained of by the provisions of 28 USCA § 1257(2).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Atchison, T. & S. F. Ry. Co.* v. *Public Utilities Commission of California*, 346 U. S., 346; *Metlakatla Indian Community Annette Island Reserve* v. *Egan*, 363 U. S., 555; *Blackburn* v. *State of Alabama*, 361 U. S. 199.

The statute of the State of North Carolina which is involved is G. S. 1-247, and reads as follows;

> "A judgment by confession may be entered without action either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this article.
>
> A judgment by confession may be entered for alimony

or for support of minor children, and when the same shall have been entered as provided by this article, such judgment shall be binding upon the defendant, and the failure of the defendant to make any payments, as required by such judgment, shall, upon proper cause shown to the court, subject him to such penalties as may be adjudged by the court as in any other case of contempt of its orders, subject to authority of the court to modify said judgment thereafter for proper cause shown as provided by law in case of adverse judgments in proceedings for such alimony or support."

Questions Presented

The following questions are presented by this appeal:

(1) Does the Order of his Honor, BONE, J., entered in the above-entitled action committing the defendant, Charlie Herbert Pulley, to jail as a means of enforcement of the "Confession of Judgment" and "Judgment" entered on July 11, 1958, in the office of the Clerk of the Superior Court of Onslow County, violate the rights of the defendant, Charlie Herbert Pulley, guaranteed to him under Sections 16 and 17 of Article 1 of the Constitution of North Carolina?

(2) Does the Order of his Honor, BONE, J., entered in the above-entitled action, committing the defendant Charlie Herbert Pulley, to jail as a means of enforcement of "Confession of Judgment" and "Judgment", entered on July 11, 1958, in the office of the Clerk of the Superior Court of Onslow County, violate the rights of the defendant, Charlie Herbert Pulley, guaranteed to him under the terms and provisions of the Fourteenth Amendment to the Constitution of the United States?

(3) Is Chapter 95 of the Public Laws of the 1947 Session of the Legislature of North Carolina, which provides for the enforcement of confessions of judgment for ali-

mony through contempt proceedings, in violation of the rights and privileges guaranteed the defendant, Charlie Herbert Pulley, under the terms and provisions of Sections 16 and 17 of Article 1 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States, specifically the second sentence of Section 1 of said Amendment, rendering the said Act of the Legislature void and of no legal force and effect!

Statement of the Case

On July 11, 1958, the defendant signed a "Confession of Judgment" before his Honor, W. F. Justice, Clerk of the Superior Court of Onslow County, and upon which the said Clerk of the Superior Court entered "Judgment" on the same date. (R. pp. 1-4).

On July 11, 1958, the above-named plaintiff and defendant executed between themselves a Deed of Separation. (R. pp. 18-22). The portion of the Deed of Separation relating to the "Confession of Judgment" and "Judgment", is as follows:

"AND WHEREAS, the said husband has agreed to make provision for the support and maintenance of the said wife and to that end has this date confessed judgment before the Clerk of the Superior Court of Onslow County, North Carolina, wherein he acknowledged an obligation to support the said wife and has consented that a judgment be entered against him that he pay to the said wife the sum of Sixty-Two Dollars and Fifty Cents ($62.50) on the 3rd and 18th day of each and every succeeding month hereafter." (R. p. 19)

In the "Confession of Judgment" it is stated that—

> ". . . the defendant in the above-entitled action, do hereby confess judgment and authorize entry thereof,

subject to further order of court as in such cases by law made and provided, in favor of Helen Elizabeth Pulley of Onslow County, North Carolina, the plaintiff herein, in the form of alimony inthe sum of Sixty-two Dollars and Fifty Cents ($62.50) on the 3rd and 18th of each and every month hereafter from the 3rd day of July 1958, for her maintenance and support". (R. pp. 1-2)

The facts recited in the "Judgment", in part, state:

". . . . that the defendant is desirous of making provision for the support and maintenance of the plaintiff and to that end has authorized the entry of judgment that the defendant pay to the plaintiff the sum of Sixty-Two Dollars and Fifty Cents on the 3rd and 18th days of each and every month from the 3rd day of July, 1958, as an obligation justly due by the defendant to the plaintiff for her support and maintenance;" (R. p. 3),

and it is decreed:

"Now, THEREFORE, upon the confession of the defendant entered of record in this cause and under the authority of and according to the terms of Section 1-247, Article 24, Chapter 1 of the General Statutes of North Carolina, IT IS ORDERED, ADJUDGED AND DECREED that Helen Elizabeth Pulley, the plaintiff herein, have and recover of Charlie Herbert Pulley, the defendant herein, the sum of Sixty-Two Dollars and Fifty Cents ($62.50) on the 3rd and 18th of each and every month from the 3rd day of July, 1958, for her maintenance and support, together with the costs of this action." (R. p. 3).

The defendant paid to his wife the sum of $62.50 on the 3rd and 18th of each month from July 3, 1958, to December 3, 1960. (R. p. 5).

On August 8, 1960, the defendant instituted a suit against the above-named plaintiff in the Johnston County Recorder's and Domestic Relations Court for an absolute divorce upon the ground of two years separation. (R. pp. 25-26)

The above-named plaintiff filed answer in the divorce suit (R. pp. 26-29), and later elected not to contest the case, and decree of absolute divorce was entered by said Court on November 30, 1960. (R. pp. 30-32).

The above-named plaintiff filed a motion in the above-entitled action under date of January 6, 1961, for an order requiring the defendant to appear at a time and place to be designated by the Court and show cause "if any there be" why he should not be attached for contempt. (R. pp. 4-6). Notice of the motion was issued on January 6, 1961, and served upon the defendant on the same day, together with the *said motion.* (R. p. 4).

The defendant filed answer to the motion, denying the material allegations thereof, and affirmatively alleging that the "Confession of Judgment" was void for that:

(a) It was not verified;

(b) It did not state facts sufficient to create an obligation within the terms and provisions of G S 1-247, and to state facts sufficient to constitute a cause of action, or to vest the Court with jurisdiction to enter a valid judgment;

(c) It was void for indefiniteness;

(d) That it did not come within the purview of orders and decrees which may be enforced through contempt proceedings, in that it did not direct the defendant to make any payment to the plaintiff. (R. pp. 6-7).

The plaintiff filed reply to the defendant's answer to motion (R. p. 8); and, by permission of the Court, filed Amended Reply. (R. pp. 9-32).

Among the defenses alleged by the plaintiff to the defendant's attack upon the judgment, was the plea of estoppel (R. pp. 11-17); and among other things, alleged:

> "That the aforesaid separation agreement, confession of judgment, and judgment are interdependent:" (R. p. 13).

Upon the hearing of the said motion, his Honor, MORRIS, J., found as a fact—

> ". . . that the judgment is a contract between the plaintiff and the defendant, sanctioned by the Court, constituting itself a consent judgment and for which citation for contempt will not lie;" (R. p. 35),

and entered an order dismissing the same, from which ruling the plaintiff appealed to the Supreme Court. (R. pp. 35-36). The said ruling was reversed and the Opinion of the Court is reported as "PULLEY v. PULLEY, 255 NC 423". The opinion concluded with the provision—

> "The lower Court will issue a show cause order as prayed in plaintiff's motion, and then have a hearing on such order according to law."

Show cause order was issued by his Honor, BONE, JUDGE, on January 8, 1962, returnable on January 15, 1962, (R. pp. 36-37), which was served upon the defendant, together with a copy of the said motion dated January 6, 1961, (R. pp. 37-38).

The defendant filed answer to the said motion and show cause order, alleging that the Confession of Judgment and Deed of Separation were contemporaneously entered into

by agreement between the plaintiff and defendant and so construed between the parties, and that the noncompliance by the defendant with the terms and provisions thereof does not entitle the plaintiff to an order directing that the defendant be imprisoned as a means of enforcing the payment thereof; and further alleging that the entering of such an order would be in violation of the rights guaranteed to the defendant by Sections 16 and 17 of Article I of the Constitution of North Carolina, providing that there shall be no imprisonment for debt in this State except in cases of fraud; and in violation of the rights guaranteed to the defendant under the terms and provisions of the Fourteenth Amendment to the Constitution of the United States. (R. pp. 40-44).

The defendant further alleged that he interpreted the statements made to him in the course of the signing of the Confession of Judgment and Deed of Separation as meaning that he would pay $62.50 on the 3rd and 18th of each month beginning July 3, 1958, for a period of two years or until a divorce decree was entered between him and his wife upon the ground of two years' separation; and that he, in good faith, made the payments until December 3, 1960, and discontinued the making of the same at that time, sincerely believing that he was not further obligated to make payments. (R. pp. 44-47).

The hearing on the show cause order was had before Boxe, J., at the January Term 1962 (second week) of the Superior Court of Onslow County upon affidavits (R. pp. 49-63), and Boxe, J. entered an Order (R. pp. 64-67) holding the defendant in contempt of Court and ordering the defendant confined to the common jail of Onslow County for the period of thirty (30) days, and further provided that the defendant could purge himself of his contempt

upon the payment of the sum of $1,625.00 into the office of the Clerk of the Superior Court of Onslow County, to be paid by said Clerk to the Plaintiff.

Bone, J., in his order, among other things, found as a fact that—

> ". . . the terms of the said Confession of Judgment and Judgment were discussed and agreed upon by the parties . . ." (R. p. 65).

From the order of his Honor, Bone, J., the defendant appealed to the Supreme Court of North Carolina, assigning errors.

In an opinion filed March 28, 1962, the Supreme Court of North Carolina affirmed the order of his Honor, Bone, J., entered at the January 1962 Term of the Superior Court of Onslow County.

On May 30, 1962, the defendant filed Notice of Appeal to the Supreme Court of the United States, from the final opinion and judgment of Supreme Court of North Carolina filed March , 1962.

The Questions Presented Are Substantial

The judgment below should be reversed because it erroneously sustains the constitutionality of a statute of the State of North Carolina which allows the defendant to be imprisoned for debt in violation of the North Carolina constitutional prohibition against imprisonment for debt.

Section 16 of Article I of the Constitution of North Carolina, provides:

> "There shall be no imprisonment for debt in this State except in cases of fraud."

Section 17 of Article I of the Constitution of North Carolina, provides:

> "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

If the Legislature of North Carolina can provide for the enforcement of the judgment in the case at bar through contempt proceedings within the terms and provisions of the Constitution of North Carolina, and of the United States, upon which the defendant relies for the invalidity of the said statute, it may provide for the enforcement of the payment of any debt through contempt proceedings.

The defendant respectfully submits that the action of the Legislature of North Carolina in enacting G. S. 1-247 providing for imprisonment for debt through contempt proceedings was unconstitutional and void, and this Court should so hold.

Conclusion

WHEREFORE, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257(2), Title 28, United States Code.

Respectfully submitted,

GUY ELLIOTT,
Kinston, North Carolina,
Attorney for the Appellant.

JONES, REED & GRIFFIN,
Kinston, North Carolina.

APPENDIX

IN THE SUPREME COURT OF NORTH CAROLINA
SPRING TERM 1962

No. 171—Onslow

HELEN ELIZABETH PULLEY,

v.

CHARLIE HERBERT PULLEY

Appeal by defendant from BONE, J., January Term 1962 of Onslow.

This is an appeal from an order entered pursuant to a hearing upon an order directing the defendant to show cause why he should not be held and punished as for contempt for failure to comply with a confessed judgment entered on 11 July 1958, directing that he pay a stated sum, to wit, $62.50 on the 3rd and 18th days of each and every month from the 3rd day of July 1958, to the plaintiff for her support and maintenance.

This case is before us a second time. On the first appeal, Pulley v. Pulley, 255 NC 423, 121 SE 2d 876, an order of the lower court dismissing the plaintiff's motion to show cause why the defendant should not be held in contempt for failure to comply with the terms of said confessed judgment, was reversed, and the lower court was directed to issue a show cause order as prayed for in the plaintiff's motion and to have a hearing thereon.

A show cause order was issued and duly served on the defendant. The hearing was held on 17 January 1962 before his Honor, BONE, J., regularly assigned to hold the courts of the Fourth Judicial District and presiding at the January Term 1962 of the Superior Court of Onslow County.

The court found that the defendant had not paid any sum whatsoever to the plaintiff, as required in the confessed judgment entered on 11 July 1958, since paying her the sum of $62.50 on 3 December 1960; that the defendant has

wilfully failed and refused to comply with said judgment, and is now in arrears in his payments due the plaintiff under said judgment in the sum of $1,625.00 up to and including 17 January 1962; and that the defendant's failure to comply with said judgment is not due to any financial inability on his part, but was caused and is solely due to his intentional, persistent and wilful purpose to avoid compliance with the terms of said judgment. The court entered the following order:

"IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that the defendant, Charlie Herbert Pulley, on account of his wilful failure and refusal to comply with the judgment in this cause, be and he is hereby adjudged in contempt of this court and that the said Charlie Herbert Pulley be punished for his contempt and, as punishment therefor, IT IS ORDERED that the said Charlie Herbert Pulley be confined in the common jail of Onslow County for the period of 30 days."

It was further ordered that the defendant could purge himself of this contempt by payment of the sum of $1,625.00 into the office of the Clerk of the Superior Court of Onslow County, which sum would in full payment of alimony due the plaintiff up to and including the 17th day of January 1962, pursuant to the provisions of said confessed judgment.

The facts in this case were set out in detail in the opinion on the former appeal, including the relevant parts of the separation agreement executed by the parties on 11 July 1958 and a verbatim copy of the confessed judgment. Hence, we deem it unnecessary to repeat them herein.

The defendant appeals from the order entered in the court below, assigning error.

A. TURNER SHAW, JR.; ELLIS, GODWIN & HOOPER for plaintiff.

JONES, REED & GRIFFIN for defendant.

Denny, C. J. The appellant on this appeal seeks to have us review and reconsider substantially the identical questions presented and decided on the former appeal with re-

spect to the validity of the confessed judgment and the right to have its terms enforced by contempt proceedings. He contends that the court below committed error in not holding that such judgment was merely a consent judgment and not enforceable by contempt proceedings. These questions were considered and determined in the former appeal and decided adversely to the defendant. The opinion became the law of the case and the lower court was bound thereby. Glenn v. City of Raleigh, 248 NC 378, 103 SE 2d 482; Hayes v. City of Wilmington, 243 NC 525, 91 SE 2d 673; Bruce v. O'Neal Flying Service, 234 NC 79, 66 SE 2d 312; Maddox v. Brown, 233 NC 519, 64 SE 2d 864.

In the former opinion, Parker, J., speaking for the Court said: "It is to be understood that we are not passing upon the question of the validity of the confessed judgment, and the entry of judgment thereon, if they were assailed by a creditor, or challenged by defendant on the ground of fraud, mistake, or oppression. We place our decision squarely upon the ground that defendant, under all the facts here, is estopped to question the validity of his own confessed judgment for alimony, and of the entry of judgment therefor by the superior court of Onslow County as authorized by him, and to question that the entry of judgment by the court on the confessed judgment is a order to pay alimony.

"The court below erred in not holding that defendant is estopped to question the validity of his own confessed judgment for alimony, and of the entry of judgment therefor by the court, and to question that the judgment entered by the court on his confessed judgment is an order of court for defendant to pay alimony, and in concluding that they are a mere contract between plaintiff and defendant constituting consent judgments unenforceable by contempt proceedings, and in ordering plaintiff's motion to show cause dismissed. The lower court will issue a show cause order as prayed in plaintiff's motion, and then have a hearing on such order according to law."

The court below, in issuing the order to show cause and in having a hearing thereon, merely followed the directive of this Court in its former opinion.

Th remaining question is whether there is sufficient evidence to support the ruling on the court's finding that the defendant's failure to comply with the judgment ordering him to pay the stated sums according to the terms of the confessed judgment to the plaintiff for her support and maintenance, was wilful.

The defendant has not contended that he has been or that he is now financially unable to make these payments. The court below, after hearing the evidence of the plaintiff and the defendant and the arguments of counsel, among other things, found that, on 11 July 1958, when the defendant signed the confession of judgment herein and the judgment was entered on the defendant's confession of judgment, he fully understood what he was signing and the effect of same; "that he understood that the payments referred to in the said confession of judgment and judgment were to continue so long as he and the plaintiff lived and would continue whether or not he obtained a divorce from the plaintiff * * *."

The court further found that before the confessed judgment was signed, the Clerk of the Superior Court inquired as to whether or not defendant knew that if he confessed judgment he would be liable for contempt if he failed to pay the amounts set out in the confessed judgment and the judgment entered pursuant thereto; that the defendant said he understood the judgment and further stated that it had been explained to him by the attorney.

In our opinion, the evidence is sufficient to support the findings of the court below and that such findings are sufficient to support the order entered, and we so hold.

The order adjudging the defendant in contempt, and imposing a prison sentence, and providing that the defendant may purge himself of the contempt in the manner prescribed in the order, is

Affirmed.

SHARP, J. took no part in the consideration or decision of this case.

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October Term, 1962

No. 291

HELEN ELIZABETH PULLEY,

Appellee,

v.

CHARLIE HERBERT PULLEY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

MOTION TO DISMISS OR AFFIRM

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In The

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October Term, 1962

No. 291

HELEN ELIZABETH PULLEY,

Appellee,

v.

CHARLIE HERBERT PULLEY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

MOTION TO DISMISS OR AFFIRM

Appellee, Helen Elizabeth Pulley, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the Supreme Court of North Carolina be affirmed on the ground that no substantial Federal question is presented, that the Federal question sought to be reviewed was not timely raised or expressly passed on, or in the alternative, that this appeal be dismissed.

STATE CONSTITUTION PROVISIONS AND STATUTES INVOLVED

The relevant state constitutional and statutory provisions

are set forth on Pages 2, 3, 9 and 10 of the appellant's jurisdictional statement. They are here repeated for the convenience of the Court.

Article 1, Section 16 of the *Constitution of North Carolina*, provides:

> "There shall be no imprisonment for debt in this State, except in cases of fraud."

Article 1, Section 17 of the *Constitution of North Carolina*, provides:

> "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

The statute of the State of North Carolina here involved is *North Carolina General Statutes* 1-247, which reads as follows:

> "A judgment by confession may be entered without action either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this article.
>
> "A judgment by confession may be entered for alimony or for support of minor children, and when the same shall have been entered as provided by this article, such judgment shall be binding upon the defendant, and the failure of the defendant to make any payments, as required by such judgment, shall, upon proper cause shown to the court, subject him to such penalties as may be adjudged by the court as in any other case of contempt of its orders, subject to authority of the court to modify said judgment thereafter for proper cause shown as provided by law in case of adverse judgment in proceedings for such alimony or support."

STATEMENT OF CASE

On the 11th day of July, 1958, the defendant signed a Con-

fession of Judgment before the Clerk of the Superior Court of Onslow County, North Carolina, wherein he stated: (Rp. 2) "This confession is for an obligation for maintenance and support justly due by the defendant to the plaintiff and which obligation arose in the following manner, to wit:" Here the appellant recited his marriage to appellee in 1933 and living together as husband and wife until the date of the Confession of Judgment when as a result of, in the appellant's words, "many differences, irreconcilable controversies and incompatibilities" which had "existed for an appreciable length of time" and continued to exist they could not live together "happily and peaceably as man and wife and believing that it is necessary to the health and happiness of both of the said parties that they should separate and live apart from each other forever hereafter." The appellant also stated in his Confession of Judgment that he did "hereby confess judgment and authorize entry thereof, subject to further order of court as in such cases by law made and provided, in favor of Helen Elizabeth Pulley of Onslow County, North Carolina, the plaintiff herein (appellee before this Court) in the form of *alimony* in the sum of Sixty-Two Dollars and Fifty Cents ($62.50) on the 3rd and 18th of each and every month hereafter from the 3rd day of July, 1958, *for her maintenance and support.*" (Emphasis Added.) The defendant-appellant further stated in the Confession of Judgment (Rp. 2) "The defendant herein has chosen this means of so doing." The said Clerk entered a judgment on the same date pursuant to such confession. Thereafter, pursuant to such Judgment, the defendant paid to the plaintiff the sum of Sixty-Two Dollars and Fifty Cents ($62.50) twice each month to and including the payment which was due on December 3, 1960, but since said date has made no payment whatever to the appellee. On January 6, 1961, the plaintiff filed a motion praying the Court that the defendant be ordered to show cause why he should not be attached for contempt for his failure to make the payments required by the Confession of Judgment and Judgment (Rpp. 5 and 6). The defendant filed his Answer to Motion (Rpp. 6 and 7) setting up several defenses including defects in his Confession of

Judgment and Judgment but making no reference whatsoever to the violation of any of his constitutional rights. The matter came on for hearing before the Superior Court of Onslow County and on March 27th, 1961, the Court denied plaintiff's Motion and dismissed the same (Rp. 35). The plaintiff appealed to the Supreme Court of North Carolina and the ruling of the Superior Court of Onslow County was reversed and the lower Court directed to issue a Show Cause Order as prayed in plaintiff's Motion. This case is reported as *Pulley* v. *Pulley*, 255 N.C. 423, which opinion was filed on 11 October, 1961.

The Show Cause Order was issued, pursuant to the North Carolina Supreme Court opinion, by the Superior Court of Onslow County, and made returnable on January 15, 1962, and was served on the defendant on 8 January, 1962 (Rp. 37) together with a copy of the first Motion to Show Cause which was dated January 6, 1961. Thereafter, the appellant filed an Answer to Motion and Show Cause Order wherein he alleged the violation of Article 1, Section 16, of the *Constitution of North Carolina*, of Article 1, Section 17, of the *Constitution of North Carolina*, of the 13th Amendment to the *Constitution of the United States* and of the 14th Amendment to the *Constitution of the United States*.

The hearing on the Show Cause Order issued under date of 8 January, 1962, was held at the January Term, 1962, of the Superior Court of Onslow County and the presiding judge entered an Order holding the defendant in contempt and ordering the defendant confined to the common jail of Onslow County for thirty (30) days and provided that the defendant could purge himself of his contempt upon the payment of Sixteen Hundred Twenty-Five Dollars ($1625.00) into the Office of the Clerk of Superior Court of Onslow County, to be paid by the Clerk to the plaintiff (Rpp. 65-67). The defendant appealed to the Supreme Court of North Carolina and in an opinion filed on the 28th day of March, 1962, in the case of *Pulley* v. *Pulley* and reported in 256 N.C. 600, the Supreme Court of North Carolina affirmed the Superior

Court of Onslow County. From such opinion and judgment on May 30th, 1962, the defendant filed his Notice of Appeal to the Supreme Court of the United States.

ARGUMENT

(A)

The case here presented does not present a substantial Federal question. Appellant has advanced only one reason that such a question is presented and that is that North Carolina General Statutes 1-247 under which the Confession of Judgment and Judgment herein were entered provides for imprisonment for debt and is thus unconstitutional. Clearly, the Confession of Judgment and Judgment are for the payment by the appellant-husband to the appellee-wife of the sum of Sixty-Two Dollars and Fifty Cents ($62.50) twice each month as alimony.

In *Penfield Company of Cal.* v. *Securities and Exchange Commission*, 330 U. S. 585 (1947) reh. denied 331 U. S. 865 (1947), this Court held that contempt has the dual function of vindication of public interest by punishment of contemptuous conduct and of coercion to compel the contemnor to do what the law requires of him.

In *Goggans* v. *Osburn*, 237 F. 2d 186, 9th Cir. (1956) the Court stated the following:

". . . For the wilful refusal of the husband to pay alimony, contempt proceedings will lie.

"These consequences flow from a decree for the payment of alimony because the duty to pay alimony, as well as support money for children, is public in nature. The community as a whole is vitally concerned that families shall not be left destitute by irresponsible husbands or fathers. The extent of this public interest is revealed in the fact that enforcement of a decree requiring the payment of alimony or support money has been held to be outside constitutional prohibitions against imprisonment for debt."

"Alimony may be enforced by process for contempt, and the contumacious husband imprisoned for his wilful refusal to pay after being ordered by the Court to do so. This imprisonment will not amount to imprisonment for debt within the meaning of constitutional provisions prohibiting such imprisonment; since alimony in the view of many of the courts is not a debt founded upon contract, but is more in the nature of a penalty, imposed upon the husband for his wrongful act and noncompliance with the order of Court." *Marriage and Divorce*, 3rd Ed., pp. 738 and 739.

Numerous cases may be cited to the effect that alimony is not a debt within the meaning of constitutional prohibitions against imprisonment for debt including:

McFerran v. *McFerran*, 348 P. 2d 222, 55 Wash. 2d 471;
Ryan v. *Ryan*, 123 So. 2d 102, 271 Ala. 243;
Clausen v. *Clausen*, 84 N.W. 2d 675, 250 Minn. 293;
Bradley v. *Superior Court In and For City and County of San Francisco*, Cal., 310 P. 2d 634;
Gibson v. *Stiles*, Ky., 240 S.W. 2d 609;
In re Bagnall's Guardianship, 29 N.W. 2d 597, 238 Iowa 905;
Krueger v. *Stone*, 188 So. 575, 137 Fla. 498;
Winkel v. *Winkel*, 15 A. 2d 914, 178 Md. 489; and
Speer v. *Speer*, Ohio Com. Pl., 74 N.E. 2d 97.

This Court in *Williams* v. *State of N. C.*, 325 U.S. 226 (1945) reh. denied 325 U.S. 895 (1945) clearly held that both divorce and marriage concern not only the parties to the marriage but also society in general.

In *Audubon* v. *Shufeldt*, 181 U.S. 575, 578 (1901) this court distinguished alimony from debt and said:

> "Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; ***"

In *Westmore* v. *Markoe*, 196 U.S. 68, 77 (1904) this court distinguished alimony and debt by stating:

> "While it is true in this case the obligation has become fixed by an unalterable decree so far as the amount to be contributed by the husband for the support is concerned, looking beneath the judgment for the foundation upon which it rests, we find it was not decreed for any debt of the bankrupt, but was only a means designed by the law for carrying into effect, and making available to the wife and children, the right which the law gives them as against the husband and father."

In *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193, 194, (1949) the following is set forth:

> "We are dealing here with the power of a court to grant the relief that is necessary to effect compliance with its decree. The measure of the Court's power in civil contempt proceedings is determined by the requirements of full remedial relief. They may entail the doing of a variety of acts, such as the production of books. (Citation). They may also require the payment of money as in the alimony cases. See Grompers v. Buck's, S & R Co., 221 U.S. 418, 442, 31 S.Ct. 492, 498, 55 L.Ed. 797, 34 L.R.A., N.S., 874; Oriel v. Russell, 278 U.S. 358, 364-365, 49 S.Ct. 173, 174, 175, 73 L. Ed. 419."

Certainly one may not be imprisoned for debt but here we are not dealing with a debt, but with alimony and with the refusal of the defendant to obey an order of court which he freely entered into.

(B)

Appellant made no contention that any of his constitutional rights had been violated until slightly in excess of one year after the motion as to contempt was filed herein by the appellee and served upon him and not until after this case had been appealed to the Supreme Court of North Carolina and had his contentions rejected. He did not raise constitutional questions at his first opportunity. In *State* v. *Jones*, 242 N.C. 563 (1955) as to North Carolina practice the court said:

> "Therefore, in conformity with the well established rule

of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below."

It is clear that the appellant after having his contentions adversely determined by the Supreme Court of North Carolina in its 1961 opinion, went fishing for any straw that he could find upon which to hang his hat.

CONCLUSION

This appeal presents no substantial Federal question. The Supreme Court of North Carolina has twice determined this action adversely to the appellant and the appeal should be dismissed or the judgment affirmed.

Dated: Jacksonville, North Carolina, August 20, 1962.

Respectfully submitted,

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